No. 86-735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") is a public corporation and political subdivision of the Commonwealth of Massachusetts, created pursuant to Mass. Statutes 1975, Chapter 775.

The Connecticut Municipal Electric Energy Cooperative ("CMEEC") is a public corporation and political subdivision of the State of Connecticut, created pursuant to Title 7, Chapter 101a of the General Statutes of Connecticut (1975).

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INTRODUCTION AND SUMMARY

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), intervenor-respondents below,[1] submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit submitted by Allegheny Electric Cooperative, Inc. ("Allegheny").[2] Allegheny seeks review of that portion

[1] MMWEC and CMEEC were intervenor-respondents before the Second Circuit on the issue raised here by Allegheny Electric Cooperative, Inc. CMEEC was also a petitioner in one of the consolidated dockets below, raising an issue which is unrelated to the issue here and as to which certiorari has not been sought.

[2] CMEEC and MMWEC, which are political subdivisions of the states of Connecticut and Massachusetts, respectively, serve as bulk power suppliers for their municipal electric distribution system members. MMWEC is composed of 34 member systems; CMEEC is composed of three member systems, known as "Participants."

of the decision in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (1986) (Petition Appendix at 1a-28a), holding that the term "neighboring States" in Section 836(b)(2) of the Niagara Redevelopment Act ("NRA"), 16 U.S.C. § 836(b)(2), means "states found to be within reasonable geographical proximity of New York, after taking into account all relevant factors and whether they are within reasonable economic transmission distance." 796 F.2d at 594, at 24a. Except for those portions which contain legal argument, for purposes of this brief MMWEC and CMEEC accept Allegheny's statement of the question presented and its statement of the case (as well as its description of and appendices containing the opinions below, an explanation of the basis for this Court's jurisdiction and a recital of the statute involved).[3]

Allegheny seeks here, as it has (unsuccessfully) before the Federal Energy Regulatory Commission ("FERC"), the New York Power Authority ("NYPA"), and the courts for ten years, a ruling that the NRA's general phrase, "neighboring States," in fact means exclusively the states of Pennsylvania and Ohio. The effect of the ruling would be to deprive rural electric cooperatives and NRA "public bodies" in Connecticut, Massachusetts, New Jersey, Rhode Island and Vermont of a valuable "preference power" resource,[4] and to provide eligible preference power customers in Ohio and Pennsylvania

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[3] Specifically, MMWEC and CMEEC do not accept Allegheny's inclusion in its Question Presented (Petition at i) of the words "as revealed by the legislative history," nor do they accept the following sentence contained in Allegheny's Statement of the Case (Petition at 4-5):

> This interpretation is contrary to an extensive and explicit legislative history which clearly establishes that Congress intended the phrase 'neighboring states' be limited to Pennsylvania and Ohio, the only states within the basin drained by the Niagara River which are claimed by any party to be within economic transmission distance of the Project.

[4] NRA "preference power" is the 50 percent of the output of the Niagara Project for which "public bodies and nonprofit cooperatives" are given purchasing "preference and priority." 16 U.S.C. § 836(b)(1).

with an even larger share of this inexpensive resource than the proportionate allocation they now receive.[5]

In support of its petition, Allegheny is unable to: (1) show the existence of any conflict between the Second Circuit's decision and the determination of another court; (2) show the presence of an issue of national importance; or (3) identify any constitutional implications of the issue it raises. Instead, Allegheny seeks a writ of certiorari by claiming that the Second Circuit's approach toward statutory construction conflicts with the teachings of this Court, and by presenting a speculative and ill-conceived claim as to the importance of this issue. Neither of these bases justifies intervention here.[6]

REASONS FOR NOT GRANTING THE WRIT

Allegheny advances two reasons which allegedly justify the granting of a writ. First, Allegheny contends that the Second Circuit's actions conflict with this Court's teachings concerning the uses of and the relationship between legislative history and "plain meaning" in statutory construction. Second, Allegheny argues that this case is of great importance because the Second Circuit's ruling could lead to the dilution of NRA preference power. Allegheny asserts that such dilution will make it "quite likely" that the pro-competitive effect of the NRA sought by Congress "may" be greatly reduced. As neither of these assertions represents an accurate portrayal of the decision below, neither justifies the issuance of a writ here.

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[5] While it would appear, given the result of a victory here, that eligible entities in both Pennsylvania and Ohio would pursue this relief in tandem, it is noteworthy that public power entities in Ohio (which participated actively on a number of issues raised below) did not join in or even support Allegheny's claim before the Second Circuit.

[6] Indeed, Allegheny's claim concerning the importance of this issue surfaced for the first time in Allegheny's application for rehearing of the challenged Second Circuit opinion. In other words, having argued its "Pennsylvania and Ohio" position before the Federal Energy Regulatory Commission, the New York Power Authority and the Second Circuit on numerous occasions since 1976, Allegheny discovered its claim concerning dilution (to be addressed below) only this year.

I. THE SECOND CIRCUIT DID NOT FAIL TO ANALYZE THE NRA LEGISLATIVE HISTORY; RATHER, ITS ANALYSIS LED THE COURT TO A CONCLUSION WHICH DIFFERS FROM THAT ADVANCED BY ALLEGHENY

Allegheny alleges (Petition at 5) that in construing the phrase "neighboring States" broadly the Second Circuit "implicitly" relied solely upon the "plain meaning" of the words, and failed to "analyze fully" the legislative history thereof. Expanding on this contention, Allegheny claims (Petition at 5-6 and 11) that the court "completely ignored" certain portions of the legislative history and, in fact (Petition at 6), failed "even to examine" the relevant excerpts of the legislative history materials cited by Allegheny. According to Allegheny, this action, and inaction, by the Second Circuit violates this Court's ruling in a number of cases that it is improper to blindly adhere to a statute's plain meaning where it is at odds with a clearly expressed congressional purpose.

It is not necessary to quarrel with Allegheny's interpretation of the relevant case law to demonstrate the fallacy of its argument, because – contrary to Allegheny's repeated assertion – the Second Circuit did not fail to "examine" and "to analyze fully" the relevant portions of the NRA's extensive legislative history (including those portions cited by Allegheny), nor did it "completely ignore" that history. Rather, the Second Circuit undoubtedly read Allegheny's brief and examined the relevant history Allegheny deemed appropriate, for the court's opinion contains repeated citations to the NRA legislative history in support of the court's interpretation of the phrase "neighboring States." Thus, the Second Circuit's discussion of the "neighboring States" question, 796 F.2d 584 at 594-95, at 24a-26a, rather than ignoring the NRA's legislative history, cites to that history more than twenty times. Given the court's thorough review of this material, it is apparent that Allegheny's true complaint is not that the Second Circuit failed to address the legislative history but that, having done so, it reached an interpretation thereof contrary to that contained in Allegheny's briefs.[7]

[7] Allegheny's further complaint (Petition at 21) that certain portions of the legislative history "say nothing" about sending power to states

Among the decisions of this Court relied upon by Allegheny (Petition at 9-10) is *Stafford* v. *Briggs*, 444 U.S. 521 (1980), where (*id.* at 536) the Court deemed it essential in interpreting a statute's meaning to look beyond the statutory language and to consider the statute's "objects and policy." Unlike Allegheny, which has never presented any policy reason why Congress might have wished to limit the sales of Niagara power to only two neighboring states, the Second Circuit in fact examined the NRA's "objects and policy" as expressed in the legislative history and concluded that the language used in the statute was consistent with that history. Thus, Allegheny's argument that the Second Circuit violated the teachings of this Court is erroneous and provides no basis for granting a writ here.[8]

II. THE DECISION IN THIS CASE WILL NOT THWART THE INTENT OF CONGRESS AS EXPRESSED IN EITHER THE NRA OR IN OTHER PREFERENCE LAWS

In an attempt to associate its "Pennsylvania and Ohio" argument with an issue of national importance, Allegheny offers its recently developed hypothesis that limiting the

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other than Pennsylvania and Ohio is not true, for the legislative history relied upon by the court contains references to other states and demonstrates that, as argued by MMWEC, CMEEC, and others, the boundaries envisioned by Congress on the sale of NRA preference power were practical and economic, not political. Thus, Allegheny's attempt (Petition at 22) to distinguish a reference to Massachusetts made by Congressman Miller by deeming him "confused" falls short, for it is difficult to imagine one would say "Massachusetts" when one means "Pennsylvania and Ohio." Similarly, Allegheny's attempted refutation of Congressman Chavez's reference to New England (Petition at 25) with the argument that New York, Ohio and Pennsylvania make up a large part of the northeastern section of the country should be rejected, for this Court can judicially notice that neither New York, Ohio, nor Pennsylvania is considered to be part of New England.

[8] Allegheny relies most heavily upon *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976). However, in that case this Court noted (*id.* at 9) that the appellate court decided the issue before it "exclusively by reference to the language of the statute" without giving any weight whatsoever to the legislative history. As shown above and as is evident in the Second Circuit's decision, that is surely not the case here.

distribution of preference power solely to two states will advance Congress's goal, expressed in the NRA, of fostering yardstick competition. Allegheny alleges (Petition at 25-29) that the Second Circuit's ruling, by permitting NRA preference power to be sold outside of Pennsylvania and Ohio,[9] frustrates that congressional goal because the competitive benefits of preference power are diluted as a result of its broader dispersion.

This Court should note that Allegheny's "dilution" argument is not addressed in the Second Circuit decision, for Allegheny did not brief the dilution argument to either the Second Circuit or to the FERC in the underlying administrative proceeding. Rather, the argument surfaced for the first time in Allegheny's application for rehearing of the Second Circuit decision, and the late appearance of this contention underscores both its invalidity and insignificance. As the claim was not made prior to the close of the record here, there is no underlying record evidence to support Allegheny's dilution claim. Thus, Allegheny is left to argue (Petition at 29) only that it is "quite likely" that savings will be inadequate and that the intended pro-competitive effect "may" be greatly reduced. MMWEC and CMEEC emphatically deny these assertions. In fact, the battle for allocations of NRA preference power is still being waged before the FERC, *see Municipal Electric Utilities Association of New York State, et al.* v. *PASNY*, FERC Docket Nos. EL86-24, *et al.*, "Order Establishing a Hearing, Granting Interventions, Extending the Time for the Filing of Motions to Intervene, Consolidating Proceeding, and Denying Motion to Initiate Enforcement Action," 35 FERC ¶61,333 (June 13, 1986), and before this Court. *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986), *petition for cert. filed*, Docket No. 86-736 (U.S. Nov. 3, 1986). The continuation of this battle is evidence that savings in all of the recipient neighboring states are not insignificant, and that

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[9]NRA preference power is also sold in significant quantities in Vermont, Massachusetts, Connecticut and New Jersey; in addition, a very small amount of preference power is sold in Rhode Island.

it is far more likely that the present multi-state dispersion of inexpensive power increases competition in these other geographic areas and enhances, rather than reduces, the effects intended by Congress.[10]

CONCLUSION

For the reasons set forth above, this Court should deny the petition of Allegheny Electric Cooperative, Inc. for a Writ of Certiorari.

Respectfully submitted,

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[10] In any event, the requirement that recipients be within "economic" transmission distance will assure that power is not dispersed to areas where the economic benefits thereof are *de minimis*.